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NO.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

OCTOBER TERM, 1986

WALTER PERSON,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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B. QUESTIONS PRESENTED FOR REVIEW

(1) Whether the recordings of telephone conversations made by certain Defendants in the case before this Court were inadmissible because the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 United States Code, Section 2510, et. seq. (1982), bans the use of the fruits of interceptions made for the purpose of committing a criminal act?

(2) Whether the Court of Appeals for the Sixth Circuit erred in construing the Act -- the Court of Appeals did not strictly construe the Act according to its plain meaning, but, rather, construed the statute as if it were a civil statute?

(3) Whether the decision of the Court of Appeals for the Sixth Circuit conflicts with the decision rendered by the Court of Appeals for the Eighth Circuit on the same or similar matter in United States vs. Phillips, 540 F.2d 319 (8th Cir.),

rehearing denied, (8th Cir.), cert. denied, 429 U.S. 1000 (1976) and with the decision of the Sixth Circuit in United States vs. Jones, 542 F.2d 661 (6th Cir. 1976).

(4) Whether the Court of Appeals for the Sixth Circuit erred in its consideration of Defendant Person since he did not consent to the interception of his conversations, was factually unaware of said interceptions, and, therefore, was entitled to suppress the tapes that contain those conversations based upon Title 18, United States Code, Section 2510, et. seq.?

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114 Cong. Rec. 14694-14695 (May 23, 1968). 50

C. PARTIES TO THE PROCEEDINGS

W. Hickman Ewing and Frederick H. Godwin, United States Attorney and Assistant United States Attorney, represented the United States of America before the District Court for the Western District of Tennessee, Western Division. Mr. Ewing and Mr. Godwin also represented the Government before the Court of Appeals for the Sixth Circuit.

At the District Court level, Robert M. Friedman served as defense counsel for Defendant Walter Person. Mr. Friedman represented Mr. Person through the Appeal to the Court of Appeals for the Sixth Circuit.

At the District Court level and on Appeal, James D. Causey represented Defendant Tony Rayburn.

At the District Court level and on Appeal, Stephen Butler and Albert Boyd represented Defendant Howard "Ace" Underhill.

At the District Court level and on Appeal, Frank Holloman represented Defendant Pat Tata.

At the District Court level and on Appeal, Tommy Jagendorf represented Defendants Eddie Osborne and Joe Osborne.

John P. Colton, Jr. represented Defendant, Daniel Rokitka.

D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit has been recommended for full text publication. A copy of the unpublished Opinion shall be included in an Appendix, which will be timely filed pursuant to the provisions of Rule 30 of the Rules of the Supreme Court of the United States. Further, Defendant, Walter Person, wishes to join into the Appendix previously filed in the cause by Defendant, Tony Rayburn.

E. JURISDICTIONAL STATEMENT

(1) The Judgment sought to be reviewed was decided and filed March 6, 1987.

(2) The Defendant did not file a Petition for Rehearing En Banc nor has the Defendant petitioned for an extension of time within which to file his Petition for Certiorari.

(3) The Petitioner anticipates no Cross-Petition for Certiorari; however, the Petitioner anticipates that one or more of the Defendants in the consolidated Appeal will petition for Certiorari.

(4) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

F. RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

(1) Rule 901 of the Federal Rules of Evidence;

(2) Rule 1002 of the Federal Rules of Evidence;

(3) Title 18, United States Code, Section 2;

(4) Title 18, United States Code, Section 371;

(5) Title 18, United States Code, Section 1084(a);

(6) Title 18, United States Code, Section 1952(a)(1);

(7) Title 18, United States Code, Section 1955;

(8) Title 18, United States Code, Section 2510 (Appendix B);

(9) Title 18, United States Code, Section 2511(1) (Appendix C);

(10) Title 18, United States Code, Section 2515 (Appendix D);

(11) Title 18, United States Code, Section 2518 (Appendix E);

(12) Title 18, United States Code, Section 2520;

(13) Title 26, United States Code, Section 7262;

(14) Title 46, United States Code, Section 596;

(15) Tennessee Code Annotated, Sections 39-6-601, 39-6-602, 39-6-603, 39-6-604, 39-6-607, 39-6-608, 39-6-610, 39-6-611 (Sections 39-6-601 and 39-6-602 are set for in Appendix F).

G. STATEMENT OF THE CASE

On November 20, 1985, the Federal Grand Jury for the Western District of Tennessee returned a five (5) count Indictment charging Walter Person, your Defendant, and four (4) other individuals with violation of certain Federal and State Gambling Laws. Mr. Person is charged in Count One and Count Two of the Indictment only.

On February 7, 1986, the Defendant, Walter Person, by and through his attorney of record, the Honorable Robert M. Friedman, filed a written Motion in Limine Regarding the Suppression of Evidence, to Wit: Tape Recorded Communications and/or Motion to Prohibit the Use of Intercepted Tape Recorded Oral Communications Pursuant to Title 18, United States Code, Section 2515. (R. 21:U.S. vs. Underhill) The attorneys for the other Defendants orally joined in this Motion at different times between February 7,

1986 and March 7, 1986. (R. 16:U.S. vs. Underhill).

An Evidentiary Hearing on the written Motion filed on behalf of the Defendant Person was conducted on the date of February 28, 1986. On March 6, 1986, the Honorable Robert M. McRae, Trial Judge, entered his written Ruling on Cassette Tapes Seized at 4525 Macon Road, Memphis, Tennessee.

The United States filed a Motion to Reconsider on March 31, 1986, same which was denied pursuant to the Honorable Trial Judge's written Order on Motion to reconsider Ruling on Cassette Tapes Entered on Docket Sheet March 6, 1986, on the date of April 7, 1986. On April 4, 1986, the United States filed a Notice of Appeal and on June 18, 1986, the United States mailed its Brief to the United States Court of Appeals for the Sixth Circuit, same which was received by Counsel for the Defendant, Walter Person, on

June 20, 1986. Appeal to the Court of Appeals for the Sixth Circuit was thereby perfected.

In its Opinion dated March 6, 1987, the Court of Appeals for the Sixth Circuit reversed the Judgment of the District Court.

The relevant facts underlying the Indictments handed down by the Federal Grand Jury for the Western District of Tennessee are as follows:

On March 23, 1985, a Federal Search Warrant was issued and executed on an apartment located at 4525 Macon Road, Memphis, Shelby County, Tennessee, same which was leased by the Defendant, Dan Rokitka. (Jefferson Smith at T.R. 13, 14; Richard Gray at T.R. 26) The Defendants Rokitka and Howard "Ace" Underhill were present at the time of the search. (Smith at T.R. 13-14) Pursuant to the execution of said Warrant, fifteen (15) audio cassette tapes were seized at this location, several of which contain

conversations between the Defendant, Walter Person, and Mr. Underhill or Mr. Rokitka. (Smith at T.R. 17; Ewing "Stipulation" at T.R. 24. SEE ALSO: Exhibit 3 to T.R. at 53)

No audio cassette recording tapes, line sheets, or other gambling paraphernalia were seized from the residence of the Defendant, Walter Person, nor was a search ever conducted of his residence or business premises. (Smith at T.R. 21) Further, there is no showing whatsoever within the record that the Defendant, Walter Person, had any knowledge of the fact that his voice was being tape recorded by Mr. Underhill and/or Mr. Rokitka, nor was there any showing whatsoever that Mr. Person had any knowledge of the existence of the tape recording devices which were attached to the telephones located at 4525 Macon Road, Memphis, Shelby County, Tennessee. (SEE: Ewing Argument T.R. 58-59)

Counsel for Defendant Person attempted to procure the sworn testimony of Mr. Rokitka (T.R. 65-66) and Mr. Underhill (T.R. 67-68) pertaining to their creation of the fifteen (15) tapes without the knowledge or consent of Mr. Person and/or others whose voices were recorded thereon but was not allowed to call said individuals by specific Order of the Honorable Trial Judge.

H. ARGUMENT

According to Rule 17 of the Rules of the United States Supreme Court, the following list indicates the criteria to be considered in granting a review on Certiorari:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so for sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The Petitioner, Walter Person, respectfully submits that the instant case satisfies the requirements of subsections (a) and (c) of Rule 17.

In its decision dated March 6, 1987, the Court of Appeals for the Sixth Circuit addressed the question of "whether the participants in an illegal gambling business, some of whom caused their recorded telephone conversations to be intercepted and recorded, are entitled to have these recordings suppressed during a prosecution for violation of federal anti-gambling statutes".

The answer hinged the Court's construction of various provisions of the

Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Title 18, United States Code, Section 2510, et. seq. (1982) (hereinafter referred to as "Title III" or the "Act").

The Court of Appeals quoted the exclusionary provision of the Act contained at Title 18, United States Code, Section 2515:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

The Court of Appeals determined that Section 2515 is not self-executing. An

aggrieved person may move to suppress the contents of an intercepted communication pursuant to Title 18, United States Code, Section 2518(10)(a)(i). Section 2510(11) defines an aggrieved person as one "who was a party to any intercepted wire or oral communication or a person against whom the interception was directed".

As the Court noted, Section 2511(1)(a) prohibits all willful interceptions of wire an oral communications by a person who knows or has reason to know that information was obtained through an unlawful interception.

Section 2511(2) enumerates the exceptions to the general proscription against interceptions.

The Defendants contended before the Sixth Circuit that the only exception which could render the tapes legal did not apply because of the purpose for which Defendants Rokitka and Underhill made the tapes.

Specifically, the Defendants referred to Title 18, United States Code, Section 2511(2)(d):

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

The District Court found the language of this statute clear and unambiguous and, therefore, was compelled to comply with its command. The Court of Appeals, however, reached considerably beyond the plain, unambiguous language of this statute to achieve a different result.

The Court of Appeals acknowledged that the precise question presented in this case has not been decided by the Supreme Court of the United States or another Court of Appeals. The provisions of the Act under review, however have been considered in other settings.

In deciding the case, the Court of Appeals for the Sixth Circuit employed the following analysis: According to the Court of Appeals, the primary purpose of the Omnibus Crime Control Act is to provide a more effective means for combating organized crime in the United States. The second purpose of the Act is to prohibit all other interceptions and disclosures of wire and oral communications unless specifically authorized by provisions of the Act. (Op. at 8-9). The Court determined that since the interceptions in question were made by private individuals not acting under any

color of law, Section 2511(2)(d) is the only exception arguably applicable.

The Court of Appeals concluded that the legality of an interception is determined by the purpose for which the interception is made, not by the subject of the communication intercepted. (Citing United States vs. Truglio, 731 F.2d 1123, 1131 (4th Cir.), cert. denied, 105 S.Ct. 197 (1984). The Court observed that generally when the purpose of an interception is to make an accurate record of a conversation with the intention of preventing future distortions by a participant, the interception is legal. Citing, By-Prod Corp. v. Armen-Berry Co., 668 F.2d 956, 959 (7th Cir. 1982); United States v. Phillips, 564 F.2d 32, 33 (8th Cir. 1977).

According to the Court of Appeals' Opinion at Pages 9 and 10, Underhill and Rokitka testified that the purpose of taping the conversations was to make a record to settle any future disputes about the terms of

betting transactions. The Court's statement clearly is inaccurate. Underhill and Rokitka did not testify at the suppression hearing, although counsel for Defendant Person attempted to call them to the stand as witnesses. This was prohibited by Order of the Trial Judge. Rather, Agent Gray testified generally about his conversations with Underhill and Rokitka.

The Court further addressed the issue of whether the interceptions were made "for the purpose of committing any criminal . . . act" under the laws of the State of Tennessee. The Court of Appeals stated that the recording was not an element of the criminal transaction of making and accepting bets. The transactions were unlawful in and of themselves. The recordings added nothing. The Court noted, however, that the taping of the conversations did constitute the creation of a gambling record as defined in Tennessee Code Annotated Section 39-6-601(7) and

Tennessee Code Annotated Section 39-6-602(e). Tennessee Code Annotated Section 39-6-602(e) makes it a misdemeanor to knowingly make, possess, or store a gambling record. The Court of Appeals concluded that the communications were intercepted for the purpose of committing a criminal act.

The Court did not end its inquiry, however. The Court further addressed the issue of whether the exclusionary rule contained in Section 2515 applied to the circumstances of this case.

In its analysis of this issue, the Court of Appeals addressed the appropriate standard to be used in construing statutes.

The Court recognized the general rule that when the intent of Congress is expressed in plain terms, the Court must treat that language as conclusive. Citing, Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982). The Court of Appeals clearly deviated from the general rule,

relying upon the case of United States v. American Trucking Associations, Inc., 310 U.S. 534, 542-44 (1940).

The Court of Appeals acknowledged that the Supreme Court in Gelbard v. United States, 408 U.S. 41, 48 (1972), described the protection of privacy as the overriding congressional concern behind enactment of Title III. The Sixth Circuit stated that the Act provided protection to the victims of unlawful interceptions, not to the perpetrator. The Court of Appeals concluded:

> We think it is clear that Congress did not intend for Section 2515 to shield the very people who committed the wrongful interceptions from the consequences of their wrongdoing. Underhill and Rokitka waived their right of privacy in these communications by their deliberate act of causing them to be recorded. If the language of Sections 2511(2)(d) and 2515 were applied literally to Underhill and Rokitka, it would produce an absurd

result that we are confident Congress did not intend.

The Court of Appeals rejected Defendant Person's argument that he did not consent to or have knowledge of the interception of his conversations and, therefore, was entitled to suppress the tapes containing his conversations. According to the Court of Appeals, if Person had been a mere customer of a gambling establishment, this argument would have merit. Without a scintilla of evidence to support same, the Court of Appeals determined Mr. Person to be a "confederate" of Underhill and Rokitka, and, therefore ruled that he waived his right of privacy in the conversations. Because all of the Appellees were charged with conspiracy, the Court held the individual Defendants bound by the acts of the co-conspirators. Citing, Pinkerton v. United States, 328 U.S. 640, 646-48 (1946); United States v. Bowers, 739 F.2d 1050, 1052 (6th

Cir.), cert. denied sub nom.; Oakes v. United States, 469 U.S. 861 (1984).

For the following reasons, the Defendant, Walter Person, respectfully insists that the Court of Appeals was in error in reversing the Judgment of the District Court.

(1) Recordings of telephone conversations made by certain Defendants were inadmissible because the Federal Wiretap Act bans the use of the fruits of interceptions made for the purpose of committing a criminal act.

The Defendant, Walter Person, insists that the tapes seized by the Government in the case before this Court do not meet the requirements of Rule 901 and Rule 1002 of the Federal Rules of Evidence. Moreover, Defendant Person insists that the information contained therein was obtained in violation of Title 18, United States Code, Section 2510, et. seq.

In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act, Title 18, United States Code, Section 2510, et. seq. Sections 2511(2)(d), 2515, and 2518(10)(a) apply to the case before this Court.

Title 18, United States Code, Section 2511(2)(d) provides as follows:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

Title 18, United States Code, Section 2515 provides as follows:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Title 18, United States Code, Section 2518(10)(a) provides as follows:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom on the grounds that -

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or,

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may, in his discretion, make available to the aggrieved person or his counsel for inspection such portions of the interception communi-

> cation or evidence derived therefrom as the judge determines to be in the interest of justice.

The Indictments in the cases before this Court charged the Defendants with violating and conspiring to violate Title 18, United States Code, Section 1955 by conducting illegal gambling businesses in violation of Tennessee Code Annotated Sections 39-6-601, 39-6-602, 39-6-603, 39-6-604, 39-6-607, 39-6-608, 39-6-610, and 39-6-611.

Section 1955 provides, in pertinent part, as follows:

> Prohibition of Illegal Gambling Businesses. (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section --

(1) "Illegal gambling business" means a gambling business which - (i) is a violation of the law of this State, or a political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantial continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "Gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, di-

> rect, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenues in excess of $2,000 in any single day shall be deemed to have been established.

Tennessee Code Annotated Section 39-6-602(e) and 39-6-603(a) provide as follows:

> (e) Whoever knowingly prints, makes, possesses, stores, or transports any gambling record, or buys, sells, offers or solicits any interest therein, whether through an agent or employee, or otherwise, shall be guilty of a misdemeanor and shall be fined not more than five hundred dollars ($500.00) and, in the discretion of the Court, imprisoned in the county jail or workhouse for a period of time not more than six (6) months, and in the enforcement of this subsection, direct

> possession of any gambling records shall be presumed to be knowing possession thereof.
>
> * * *
>
> (a) Whoever knowingly transmits or receives gambling information by telephone, telegraph, radio, semaphore, or similar means, or knowingly installs or maintains equipment for the transmission or receipt of gambling information, shall be fined not more than one thousand dollars ($1,000.00), or imprisoned not more than one (1) year, or both.

Judge McRae made the reasonable finding of fact that Rokitka and Underhill made the tapes for the purpose of recording illegal wagers; therefore, these Defendants created the tapes for the purpose of committing a criminal act under the laws of the State of Tennessee regarding gambling, gambling records, and transmitting gambling information. Judge McRae ordered the tapes suppressed under Section 2515. Defendant

Person respectfully insists that Judge McRae correctly interpreted and applied Sections 2511(2)(d) and 2515 to the facts existent in the instant case, according to the plain mandate of the statutory provision.

(2) Criminal statutes should be strictly construed; however, the Court of Appeals did not strictly construe the Federal Wiretap Act in its decision dated March 6, 1987, but, rather, very loosely construed the statute as if it were a civil statute, despite its plain meaning.

The Court of Appeals acknowledged the general rule that the plain language of a statute defines the purpose of the legislation. Citing, Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982). The Court of Appeals argued that a plain reading of Sections 2511(2)(d) and 2515 led to an absurd result. The Court cited United States v. American Trucking Associations, Inc., 310

U.S. 534 (1940) in support of this proposition.

In the American Trucking case, the Supreme Court considered whether the Interstate Commerce Commission's power under the Motor Carrier Act of 1935 to establish reasonable requirements with respect to the qualifications of maximum hours of service of employees of motor carriers extended to employees other than those whose duties affected safety of operation. Id. at 538. The Court restricted the meaning of employees to those employees whose activities affected the safety of operation. Id. at 553.

In the Griffin case, in contrast, the Court literally applied the statute in question. The Griffin case concerned the application of Title 46, United States Code, Section 596, repealed August 8, 1983, which required vessel owners and masters to promptly pay seamen after their discharge from service. Section 596 further

authorized seamen to recover double wages for each day payment was delayed without sufficient cause. The Supreme Court addressed the issue of whether District Courts may, in their discretion, limit the period during which wage penalty accrues or whether imposition of the penalty for each day of delay is mandatory. Id. at 565-566. The Court held that the plain meaning of Section 596 left no room for discretion in deciding whether to exact payment or in choosing the time period for calculating payment. Id. at 570. The Court stated:

> "Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive'". Consumer Product Safety Commission v. G.T.E. Sylvania, Inc., 447 U.S. 102, 108 (1980).

Id. at 570.

In the Griffin case, Oceanic Contractors, Inc. argued that a literal interpretation of Section 596 would produce an absurd result. The Court recognized that interpretations which would produce absurd results are to be avoided, if alternative interpretations are consistent with the legislative purpose. Id. at 575 (citing, United States v. American Trucking Associations, Inc., 310 U.S. 542-543; Haggar v. Helvering, 308 U.S. 389, 394 (1940)). The Court refused to nullify Section 596 however hard or unexpected its effects:

> Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the lawmaking authority, and not with the courts. Crooks vs. Harrelson, 282 U.S. 55, 60 (1930).

Id. at 575.

The statute in the case before this Court is clear on its face. Section 2511(1) prohibits interception or disclosure of wire or oral communications under specific circumstances, "[e]xcept as otherwise specifically provided under this chapter."

Section 2511(2)(d) provides that it is not unlawful for a private person to intercept a wire or oral communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception "unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution of the United States or of any State or for the purpose of committing any other injurious act".

Under Tennessee law, it is a crime to knowingly transmit or receive gambling information by telephone, telegraph, radio, semaphore, or similar means pursuant

to Tennessee Code Annotated Section 39-6-603(a). Under Section 2511(2)(d), the interception in the case before this Court was unlawful under the plain meaning of the statute. Section 2515, consequently, prohibits the use in evidence of an interception or its contents if the disclosure of that information violates Title III of the Omnibus Crime Control and Safe Streets Acts. Again, the statutory language is plain and unambiguous.

In its Opinion reversing the District Court, the Court of Appeals relied upon Gelbard v. United States, 408 U.S. 41 (1972). In Gelbard, the Court addressed the question of whether Grand Jury witnesses are entitled to invoke Section 2515's prohibition as a defense to contempt charges brought against them for refusing to testify. The Court concluded that they are entitled to do so. Id. at 43. The Court stated:

* * *

> Except as expressly authorized in Title III, however, all interceptions of wire and oral communications are flatly prohibited. Unauthorized interceptions and the disclosure or use of information obtained through unauthorized interceptions are crimes, Title 18, United States Code, Section 2511(1), and the victim of such interception, disclosure or use, is entitled to recover civil damages. Title 18, United States Code, Section 2520. Title III also bars the use as evidence before official bodies of the contents and fruits of illegal interceptions, Title 18, United States Code, Section 2515, and provides procedures for moving to suppress such evidence in various proceedings. Title 18, United States Code, Section 2518(9) through (10).

In Gelbard, the Court referred to the unequivocal language of Section 2515 which expressed the "fundamental policy" adopted by Congress concerning wiretapping

and electronic surveillance. Id. at 47. The Court recognized the protection of privacy as the overriding concern of Congress in enacting Title III. Id. at 48. According to the Court:

> Section 2515 is thus central to the legislative scheme. Its importance as a protection for the "victim of an unlawful invasion of privacy" could not be more clear. The purposes of Section 2515 and Title III as a whole would be subverted where the plain command of Section 2515 ignored when the victim of illegal interception is called as a witness before a Grand Jury and asked questions based upon that interception. Moreover, Section 2515 serves not only to protect the privacy of communications, but also to insure that the courts do not become partners to illegal conduct; the evidentiary prohibition was enacted also to protect the integrity of courts in administrative proceedings.

Id. at 51 (footnotes omitted).

Thus, although the Court of Appeals' Opinion in the case before this Court relies upon and authoritatively cites the Gelbard decision, it is in direct conflict with that decision.

(3) The decision of the Court of Appeals for the Sixth Circuit entered March 6, 1987 also is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit on the same matter in United States v. Phillips, 540 F.2d 319 (8th Cir.), rehearing denied, (8th Cir.), cert. denied 429 U.S. 1000 (1976) and with the decision of the Sixth Circuit in United States vs. Jones, 542 F.2d 661 (6th Cir. 1976).

In the Phillips case, the Eighth Circuit interpreted the section of the Omnibus Crime Control and Safe Streets Act pertinent to the case before this Court. In the Phillips case, the Defendant appealed a perjury conviction. The Eighth Circuit

vacated the conviction and remanded the case for further proceedings.

Defendant Phillips was prosecuted for knowingly making false material statements before a Grand Jury. The Grand Jury convened in 1971 to investigate a conspiracy involving persons allegedly engaged in organized crime in Kansas City, Missouri and Northeastern Oklahoma. The alleged objective of the conspiracy was to establish prostitution activities and illegal gambling in Oklahoma nightclubs by offering bribes to local government officials in return for protection from law enforcement.

A principal target of the Grand Jury probe was Frank Grayson, an Oklahoma District Attorney. Grayson allegedly provided protection for gambling at certain local clubs. Defendant Phillips, at the time, was a practicing attorney, an Oklahoma State Senator, a close friend and political supporter of Mr. Grayson.

According to Grayson's testimony before the Grand Jury, certain persons told him that Phillips had stated that he controlled Grayson. Specifically, Grayson testified that Charles Davis, the owner of the Shangri La lounge, stated that Phillips could arrange anything Davis needed in the way of protection.

Phillips was called before the Grand Jury. The Defendant repeatedly denied that he had ever stated to anyone that he could arrange protection. In addition, Defendant Phillips denied that he made any such representation to persons affiliated with the Shangri La.

At his Trial on the charge of perjury, the critical evidence was a tape recorded meeting between Phillips, Davis, and George Overton, the manager of the Shangri La. A private detective recorded the conversation. The detective did not act under color of the law, but, rather, Davis

and Overton arranged for the recording. Phillips was not aware that the conversation was being recorded. The purpose of the meeting was to settle a fee arrangement between Phillips and the Shangri La; however, the purpose of recording the conversation was unknown. During the course of the conversation, the Defendant told Davis and Overton that the Shangri La could run illegal liquor and gambling operations on a limited basis. During the conversation, Phillips stated, "I can, I can control Frank[,]" in reference to District Attorney Grayson.

At the Trial on the perjury charge, the Governments theory was that the Defendant's statement to the effect that he could "control Frank" was a representation that he could induce Mr. Grayson to provide protection for Shangri La's illegal activities.

Prior to Trial, the Defendant filed a Motion to Suppress the tape recording

on the grounds that it was recorded in violation of the Omnibus Crime Control and Safe Streets Act of 1968. In addition, he also moved to suppress the tape on the grounds that he was not advised of his Miranda rights before testifying before the Grand Jury. The Trial Court denied the Motion and admitted the tape and its contents into evidence.

On Appeal, Defendant Phillips alleged that the conversation in question was recorded for the purpose of committing a tortious act in violation of Section 2511(2)(d).

At Trial, no evidence was presented as to why Davis and Overton recorded the conversation. The Eighth Circuit held that the ultimate burden rests with the Defendant to show that the tape was "unlawfully" recorded. The Eighth Circuit determined that the Defendant in the Phillips case was denied a meaningful opportunity to

meet the burden. The Eighth Circuit vacated the Judgment of conviction and remanded the case for hearing to afford the State and the Defendant an opportunity to present evidence as to the purpose of the recording. According to the Court, the effect of Section 2511(2)(d) is to prohibit any interception, use, or disclosure of a communication by a person not acting under color of law when the purpose is to commit a criminal, tortious or injurious act.

According to the Court, this determination must be made on a case-by-case basis. Id. at 325 (citing, Meredith v. Gavin, 446 F.2d 794, 798 (8th Cir. 1971)).

The Eighth Circuit further reviewed the sections of the Act providing for sanctions for its violation. Under Section 2515, any oral communication intercepted in violation of the Act should not be received into evidence in a judicial proceeding. Section 2518(10)(a) provides

that an aggrieved person may file a Motion to Suppress the contents of an unlawfully intercepted communication.

The Eighth Circuit further stated:

> Logic requires that the party against whom the evidence is offered, the defendant here, carry the ultimate burden of alleging and proving the specific criminal tortious, or other injurious purpose for which the interception was made. Id. at 326.

The Eighth Circuit noted, however, that the party seeking to suppress such matter must be given an opportunity to meet his or her burden of proof. The Court stated:

> On remand, the trial judge should require the Government to call the parties responsible for the interception and establish a legal purpose for the interception. If this obligation is met, the Defendant must prove, by a preponderance of the evidence, the existence

> of one of the exceptions listed in Section 2511(2)(d). The risk of nonpersuasion shall remain with the defendant. Id.

The Eighth Circuit remanded the case to district court for a hearing to determine the purpose for which the conversation was recorded. If Davis and Overton made the recording for a legitimate purpose, the Eighth Circuit stated that the judgment of conviction must be reinstated. If, however, the defendant proved by a preponderance of the evidence that Davis and Overton made the recording for a criminal, tortious or other injurious purpose, the tape had to be suppressed. In the event of a suppression, a new Trial would be necessary.

The analysis in the Phillips case is consistent with the District Court's ruling in the case before this Court. Clearly, as found by the Trial Judge, the Defendants carried the burden in showing that

the tapes were created for a criminal purpose. The District Court's ruling is also consistent with the legislative history of the Act. A statement by Senator Hart concerning the Act follows:

> In the substitute that is now pending, we propose to prohibit a one-party consent tap, except for law enforcement officials, and for private persons who act in a defensive fashion. In other words, whenever a private person acts in such situations with an unlawful motive, he will violate the criminal provisions of Title III and will also be subject to a civil suit. Such one-party consent is also prohibited when a party acts in any way with an intent to injure the other party to the conversation in any other way. For example, the secret consensual recording may be made for the purpose of blackmailing the other party, threatening him, or publicly embarrassing him. The provision would not, however, prohibit such activity when the party records information

> of criminal activity by the other party with the purpose of taking such information to the police as evidence. Nor does it prohibit such recording in other situations when the party acts out of a legitimate desire to protect himself and his own conversations from later distortion or other unlawful or injurious acts by the other party.

114 Cong Rec. 14694-14695 (May 23, 1968).

In the instant case, the Government's own witness testified that the interception constituted a criminal act; violation of Tennessee's gambling laws. Compare United States v. Traficant, 558 F.Supp. 996 (N.D. Ohio 1983) (evidence did not establish the defendant's argument that tape recordings were made for the purpose of blackmailing him or for any other illegal purpose.)

The Government did not call Rokitka or Underhill as witnesses nor did the Government in any way establish a legitimate

purpose for the interception. Therefore, Judge McRae properly suppressed the tapes as to Defendant Person, in accordance with his properly and timely filed Pre-Trial Motion.

The ruling in United States v. Jones, 542 F.2d 661 (6th Cir. 1976) is also consistent with Judge McRae's ruling. In Jones, the Court of Appeals addressed the question of whether Title III applies to interspousal wiretaps. The Court held the statute applicable stating:

> Although the primary target of the bill was organized crime, the Senate Report makes it clear that the purpose of the bill was to establish an across-the-board prohibition on all unauthorized electronic surveillance . . .
>
> (Emphasis Added)

(4) Since Defendant Person did not consent to the wiretap interception and recording of his telephone conversations, and since there is no proof whatsoever that

Defendant Person even knew of said interceptions which were effectuated by others, he is entitled to suppress the tapes that contain his conversations in this cause.

The Court of Appeals in the first paragraph on Page 13 of its Opinion considered the position of Defendant Person. Specifically, the Court determined that if Defendant Person was a mere "customer" of the gambling establishment, he would be entitled to suppression of the tapes which he did not consent to and had no knowledge of.

The Court of Appeals then makes the cursory determination, unsupported by proof or fact on the record, that Mr. Person was a "confederate" of the individuals who surreptitiously and for their own purposes made the wire intercepts. Because Mr. Person was included in the conspiracy count of the Indictment, and based upon ". . . evidence produced by the defendants at the suppression hearing (which) indicated

that all were in fact members of a conspiracy . . .", Mr. Person was found by the Court of appeals to have ". . . waived his (constitutional and statutory) right of privacy in the conversations . . .".

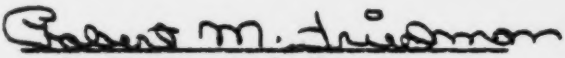
The author herein would state that he knows of no evidence whatsoever produced by the Defendants (or the Government) in the suppression hearing or in any other hearing pertinent herein which would support the factual determination espoused by the Court of Appeals, same being that Mr. Person was a confederate and/or a member of the conspiracy. Absent such fact, it is clear that Defendant Person is entitled to suppression even if the other findings of the Court of Appeals which are legally challenged herein are accepted by this Honorable Court. The mere allegation contained in the Indictment of a conspiracy is factually insufficient to create an automatic waiver of Mr. Person's constitutional and statutory rights.

I. CONCLUSION

The precise question presented in this case has not been decided by the Supreme Court or a Court of Appeals, although the provisions of the Act under review have been considered in other settings, and decided favorably to the Defendant herein.

For this reason, and for all of the foregoing reasons, the Defendant, Walter Person, respectfully requests this Court to grant his Petition in this cause and to hear and decide his case on oral argument and briefs.

Respectfully submitted,



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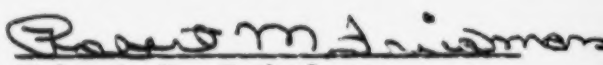
J. CERTIFICATE OF SERVICE

I, Robert M. Friedman, Attorney for Petitioner, Walter Person, hereby certify that I have, this 30th day of April, 1987, pursuant to Rule 28 of the Supreme Court Rules, caused to be served upon the Honorable W. Hickman Ewing, United States Attorney, Federal Building, Memphis, Tennessee, 38103; Mr. Frederick H. Godwin, Assistant United States Attorney, Federal Building, Memphis, Tennessee, 38103; Mr. Albert Boyd, Attorney at Law, 424 North McNeil, Memphis, Tennessee, 38103; Mr. James D. Causey, Attorney at Law, 208 Adams Avenue, Memphis, Tennessee, 38103; Mr. Tommy Jagendorf, Attorney at Law, 5248 Pellum Circle, Memphis, Tennessee, 38117; Mr. Steve Butler, Attorney at Law, 22 N. Front Street, Suite 1020, Memphis, Tennessee, 38103; Mr. John P. Colton, Jr., Attorney at Law, 629 Poplar Avenue, Memphis, Tennessee, 38105, and Mr. Frank Holloman, Attorney at Law, 240

Poplar Avenue, Memphis, Tennessee, 38103, copies of the foregoing Petition for Writ of Certiorari filed by Walter Person, by placing copies of same in the United States Mail, properly addressed, and with sufficient postage affixed thereto.



Robert M. Friedman

Supreme Court, U.S.
FILED
JUN 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1874 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1986

WALTER PERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
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4 pp

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WALTER PERSON, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order suppressing as evidence recorded telephone conversations that were seized during a warrant-authorized search.

Petitioner, together with several others, was charged in a five-count indictment returned in the United States District Court for the Western District of Tennessee. The indictment charged petitioner with conducting an illegal gambling business, in violation of 18 U.S.C. 1955, and conspiring to violate federal gambling laws, in violation of 18 U.S.C. 371. Petitioner moved to suppress tape recordings of gambling-related conversations that were seized in a warrant-authorized search of a "wire room" that petitioner and his co-defendants had allegedly used for illegal gambling. Petitioner argued that the use of the tapes as evidence

was prohibited by the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. (& Supp. III) 2510 *et seq.* He relied in particular on 18 U.S.C. 2511(2)(d), which permits surreptitious recording by a party to a conversation, except when the interception is "for the purpose of committing any criminal * * * act in violation of the * * * laws of the United States or of any State." He also relied on 18 U.S.C. 2515, which prohibits the receipt of illegally intercepted conversations in evidence "in any trial." 86-1691 Pet. App. 3-4.

On March 6, 1986, the district court granted the motion. It rejected the argument that suppression was contrary to the purposes of the wiretap statute. 86-1691 Pet. App. 4-5. On the government's appeal, the court of appeals reversed. It found that neither the general purpose of Title III to protect the privacy of parties nor the particular purpose of Section 2511(2)(d) to prevent the misuse of the contents of intercepted communications would be served by suppression in the context of this case. The court of appeals concluded that the parties to the conversations waived their right of privacy by the deliberate act of recording them. In addition, the court concluded that Congress did not intend for Section 2515 to shield the very persons who conducted the interceptions from the consequences of their own acts. 86-1691 Pet. App. 10-14.

Petitioner contends (Pet. 25-51) that a proper construction of the federal wiretap statute bars the use of the fruits of interceptions made for the purpose of committing a criminal act such as illegal gambling. He also contends (Pet. 51-53) that he is entitled to suppress the recorded telephone conversations because he did not consent and did not know that the conversations were being recorded. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would

have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him.[1] Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JUNE 1987

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[1]The court has previously denied a petition for a writ of certiorari in a companion case, *Rayburn* v. *United States*, No. 86-1691 (June 1, 1987).

[2]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.